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No. 92-885

IN THE SUPREME COURT OF THE UNITED STATES

JAY ROBERTS, individually and as Sheriff of Cambria County, and JOSEPH P. ROBERTS individually and as Commissioner of the Cambria County Board of Commissioners and Member of the Cambria County Salary Board,

Petitioners

v.

JOHN MUTSKO, ROY PLUMMER, LOUIS BEAUJON and EVELYN ARDINI,

Respondents

==========

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE THIRD CIRCUIT CLEARLY ESTABLISHED PRIOR TO 1986 THAT PUBLIC EMPLOYEES, SUCH AS DEPUTY SHERIFFS, WERE PROTECTED FROM DISMISSAL BECAUSE OF POLITICAL AFFILIATION?

II. WHETHER THE DISMISSAL OF THE RESPONDENTS BY THE PETITIONERS, AND RELIANCE ON THE LETTER OF THE COUNTY ATTORNEY, WERE NOT OBJECTIVELY REASONABLE?

III. WHETHER THE DEPUTY POSITION IS CONFIDENTIAL SO AS TO MAKE PARTY AFFILIATION A REQUIREMENT OF THE POSITION?

IV. WHETHER THE DENIAL OF SHERIFF ROBERTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS OF QUALIFIED IMMUNITY WAS INTERLOCUTORY AND NOT IMMEDIATELY APPEALABLE?

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STATEMENT OF THE CASE

HISTORY

The Respondents, Mutsko, Beaujon, Plummer and Ardini, along with fellow employees Eugene Burns and Ron Snyder whose causes of action were dismissed by the District Court and whose appeals were rejected by the Third Circuit Court as premature, filed a Complaint in Civil Action for damages and injunctive relief pursuant to the Civil Rights Act, 42 U.S.C. §1983, the First and Fourteenth Amendments to the Constitution of the United States, and other related Federal, State and common law claims. The Plaintiffs before the trial court, Eugene Burns, John Mutsko, Roy Plummer and Louis Beaujon, were deputy sheriffs of Cambria County, whose employments were terminated following the 1986 election for Cambria County Sheriff. The Plaintiff, Ron Snyder, was employed as a Clerk/Investigator at the Cambria County

Public Defender's Office, but his wages were paid by the Cambria County Sheriff's Department. The sixth Plaintiff, Evelyn Ardini, was employed as a Paramedic and Coordinator of Patient Transportation for the Defendant, Laurel Crest Manor, an agency of Cambria County. Plaintiffs Snyder and Ardini were likewise terminated from employment following the 1986 County Sheriff's election.

During the 1986 election for Cambria County Sheriff, the Petitioner Jay Roberts (hereinafter "Sheriff Roberts") was the Democratic Party's endorsed candidate for said office. Deputy Eugene Burns (hereinafter "Burns") also ran for the office of Cambria County Sheriff in that election. Mutsko, Plummer and Beaujon supported Burns in his bid for the office of County Sheriff. During Burns' candidacy, he and Mutsko, Plummer and Beaujon continued to perform their duties as Deputy Sheriffs of the County. The general election took place in November of 1985.

Burns placed second in the final ballot, and the Petitioner Jay Roberts was elected as Sheriff.

During the campaign, the the clerk/investigator Ron Snyder (hereinafter "Snyder") was approached by Thomas Burns, one of the Defendants below, to solicit his support for Jay Roberts' candidacy and to dissuade Eugene Burns from continuing his bid for that office. Evelyn Ardini had been approached by both Sheriff Roberts and his father, Petitioner Joseph Roberts, (hereinafter "Commissioner Roberts") who was also a Cambria County Commissioner at that time, to solicit information from Ardini relative to William Tomallo who was Ardini's supervisor at Laurel Crest Manor, and who was also a candidate for Sheriff. These individuals requested information relative to telephone calls received by Tomallo at Laurel Crest. Ardini did not comply with their request for information.

Prior to his installation into office, Sheriff Roberts instructed the Cambria County Salary Board to take administrative action and remove Burns, Mutsko, Plummer and Snyder from the Sheriff's Office payroll. That action was taken at a meeting of the Salary Board on January 2, 1986. Upon taking office on January 6, 1986, Sheriff Roberts filed written revocations of Burns, Mutsko, Plummer and Snyder as Sheriff Deputies. Sheriff Roberts did not schedule a call for work for Beaujon, who was a part-time employee. Ardini had been summarily discharged from employment by two of the Defendants below, Davis and Saintz on December 6, 1985.

The Complaint was filed on or about December 4, 1987. By Petition dated February 18, 1988, Preliminary Motions were filed on behalf of the Petitioner Joseph Roberts, and on behalf of County of Cambria, Cambria County Salary Board, Joseph P. Roberts, Ron

Stephenson, T.T. Metzger, Jr., Cambria County Board of Commissioners, Robert McCormick, Laurel Crest Manor and Jeffrey Saintz alleging, inter alia, that "any action or alleged action of the aforementioned Defendants is privileged and/or subject to immunity, and therefore, cannot be the basis of a cause of action." A supporting Brief was filed on behalf of those named Defendants. By Petition dated February 19, 1988, a Motion to Dismiss pursuant to Rule 12 was filed on behalf of the Petitoner, Jay Roberts, also alleging, inter alia, that: "Defendant Jay Roberts is immune from civil liability under the doctrine of qualified immunity." A brief was filed in support of this Motion to Dismiss.

By Memorandum Opinion and Order dated May 3, 1988, the Honorable Donald E. Ziegler granted in part and denied in part the Motions to Dismiss. The Court did not grant the Motions to Dismiss on the immunity claim.

The Petitioners, Joseph Roberts and Jay Roberts again raised the issue of qualified immunity in Motions for Summary Judgment under Federal Rule of Civil Procedure 56. By Memorandum Opinion and Order dated June 4, 1991, the Honorable Donald J. Lee granted summary judgment in part to some of the Defendants below and denied summary judgment as to others on the various remaining counts of the Complaint. The Court denied the motion of the Petitioners Sheriff Roberts and Commissioner Roberts for summary judgment on the doctrine of qualified immunity. Subsequent to the June 4, 1991 Opinion and Order, the Petitioners filed an Appeal of the denial of qualified immunity to the Third Circuit Court of Appeals. On June 5, 1991, a status conference was held regarding the effect of the appeal upon the trial which was scheduled for June 10, 1991.

By Memorandum Order dated June 7, 1991 the Trial Court continued the trial until

the firm trial date of February 13, 1993. Subsequent to the status conference of June 5, 1991, Notices of Appeal were filed on behalf of all of the remaining Defendants below with the exception of Wendell P. Davis.

Oral argument was conducted in the Third Circuit Court before a panel of three judges with regard to the qualified immunity issue. By opinion and order dated July 28, 1992, the Court of Appeals affirmed the District Court's denial of Commissioner Roberts' motion for summary judgment and judgment on the grounds of qualified immunity, and also dismissed the appeals of the remaining defendants as not properly before the court. The appeal of Sheriff Roberts was premature because it was interlocutory under the Prisco rationale. The other defendants had failed to properly preserve the immunity issue for appeal.

The Third Circuit Court, considering the merits of Commissioner Roberts' appeal,

determined that he did not have qualified immunity because: 1) political affiliation is not an appropriate requirement for the effective performance of a deputy's duties, thus not falling within the narrow exception recognized in Branti and Elrod; 2) the right of a public employee such as deputies not to be dismissed because of political affiliation was clearly established in the Third Circuit as early as 1982, four years prior to the dismissals in dispute; and, 3) statutory authority of a Sheriff to hire and fire deputies at his pleasure does not justify a dismissal for an unconstitutional reason.

The Petitioners filed petitions for rehearing which were denied by the Appeals Court by order dated August 25, 1991.

The Petitioners have filed the instant petition with this Honorable Court seeking Certiorari. The within brief is filed on behalf of the Respondents in opposition thereto.

SUMMARY OF THE ARGUMENT

The Third Circuit Court of Appeals clearly established in 1982 that the firing or dismissal of public employees, such as police officers and sheriff's deputies, based solely on political affiliation, is a violation of the employee's constitutionally protected rights to free speech. In the Third Circuit the law is "clearly established" when there is at least some correspondence between relevant case precedents and the conduct in dispute. Public officials in the Third Circuit are expected to apply general, well developed legal principles when considering analogous factual situations. In Bennis v. Gable, 823 F.2d 723 (3rd Cir. 1987), the Third Circuit pronounced that the illegality of political patronage firings or retaliatory action against employees for exercising First Amendment rights was clearly established as of 1982. The Seventh Circuit decision in Upton

v. Thompson, 930 F.2d 1209 (7th Cir. 1991) is fact specific and does not constitute a conflict with the Third Circuit per se.

The actions of the Petitioners and their reliance on the opinion letter of the County Solicitor was not "objectively reasonable." The firing of an at-will employee for an illegal or discriminatory reason is prohibited. The Sheriff does not have carte blanche to ignore such prohibitions against constitutional deprivations. Reliance on the opinion of the County Solicitor is a subjective justification that fails to meet the objective standard established by the Supreme Court of the United States in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1980). The opinion letter is deficient in that it does not address constitutional issues, but merely reviews the Pennsylvania statutory scheme as applied to the deputies. The letter has absolutely no application to the Respondent Beaujon who was

an emergency medical technician.

The Petitioner's argument that the deputy position is a confidential position is a gross mistatement of the facts as presented to the Trial and Appellate Courts. All parties agreed to the ministerial nature of the duties of the deputies.

The appeal of Sheriff Roberts was premature under the rationale of the Third Circuit in Prisco v. United States, 851 F.2d 93 (3rd. Cir. 1988), because the order denying his Motion for Summary Judgment was interlocutory inasmuch as the Respondents are seeking injunctive relief in addition to a claim for money damages.

ARGUMENT

I. IT WAS CLEARLY ESTABLISHED PRIOR TO 1986 THAT PUBLIC EMPLOYEES IN THE THIRD CIRCUIT, SUCH AS DEPUTY SHERIFFS, WERE PROTECTED FROM DISMISSAL BECAUSE OF POLITICAL AFFILIATION.

It is well settled law that a government official will be entitled to a qualified immunity from liability for damages only if the alleged conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known at the time the conduct occurred. Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed. 2d 411 (1985); Bennis v. Gable, 823 F.2d 723 (3rd. Cir. 1987). The standard that is applied is an "objective" standard as established in the United States Supreme Court decision of Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1980). In Harlow the Court held that qualified immunity will not be

extended to a public official where it is shown that a clearly established constitutional or statutory right has been violated and that a reasonable person in the public official's position would have known of that right.

In Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), the Supreme Court opined that a constitutional or statutory right is "clearly established" where it is shown that the right is clear enough that a reasonable official would realize that his action impinged upon that right. In addition, the Court further held that it is not necessary for purposes of denying the qualified immunity defense, that the particular action taken by the public official had been found to be unlawful prior to the incident at issue. The Supreme Court explained what is meant by a "clearly established right":

"The contours of the right must be

> sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 107 S.Ct. at 3039.

The Third Circuit Court, quoting the above stated language of the this Honorable Court, opined in Stoneking v. Bradford Area School District, (Stoneking I) 856 F.2d 594 (3rd Cir. 1988), vacated, 489 U.S. 1062, 109 S.Ct. 1333, 103 L.Ed.2d 804, that Anderson supported the Third Circuit's previous interpretation that "clearly established" requires "some but not precise factual correspondence [between the relevant precedents and the conduct at issue] and demanding that officials apply general, well developed legal principals". 856 F.2d at ____, citing: People of Three Mile Island v.

Nuclear Regulatory Commissioners, 747 F.2d 139 (3rd Cir. 1984). In Stoneking II, 882 F.2d 720 (3rd Cir. 1989) cert.den. 110 S.Ct. 840 the Court reiterated the above position stating:

> We expect officials to "apply general, well-developed legal principles." People of Three Mile Island, 747 F.2d at 144. We have explained that we have "adopted a broad view of what constitutes an established right of which a reasonable person would have known." Sourbeer v. Robinson, 791 F.2d 1094, 1103 (3rd Cir. 1986), cert. denied. 463 U.S. 1032, 97 L.Ed.2d 779, 107 S.Ct. 3276 (1987), which requires us to undertake "an inquiry into the general legal principles governing analogous factual situations, if any, and a subsequent determination whether the official should have related this established law to the instant situation." Hicks v. Feeney, 770 F.2d 375, 380 (3rd Cir. 1985).

882 F.2d at 726

In the present case, the Petitioners argue that the terminated employees rights to be free from political firings was not clearly

established at the time of their terminations because the County Sheriff had the power under the Pennsylvania County Code, 16 P.S. §1203 and 1205, to revoke the appointment of a Deputy who serves at the pleasure of the Sheriff. The Petitioners also argue that the right was not clearly established because the newly elected Sheriff, Jay Roberts, had requested and received a legal opinion from County Attorney Alex Echard which stated that a Sheriff has the authority to terminate or revoke the appointment of a Deputy under the above stated sections of the County Code. Both arguments are specious.

With regard to the statutory authority of the County Sheriff to revoke a Deputy's appointment "at pleasure," the Petitioners cannot possibly argue that the statutory language authorizes the County, the Sheriff and the Commissioners to terminate these employees for an unlawful reason. Even in Pennsylvania, where "at-will" employment is

still recognized, it has been long established that violations of constitutional rights and/or public policy cannot constitute a proper basis on which to terminate even an at-will employee. Geary v. U.S. Steel, 456 Pa. 171, 319 A.2d 174 (1974). That concept is clearly established in many varied areas of employment law. For instance, an at-will employee who serves at the pleasure of his or her master can be terminated for no reason or for any lawful reason, but cannot be terminated for an unlawful reason such as the employee's race, sex, age or religious background. In addition, violations of public policy will not shield an employer from liability such as in instances when an employee is terminated for serving jury duty, or in retaliation for filing a workers compensation claim. See: Rettinger v. American Can Co., 574 F. Supp. 306 (M.D. Pa. 1983); Harrison v. Fred S. James, P.A., Inc., 558 F. Supp. 438 (E.D. Pa. 1983).

Pennsylvania law also limits an employer's authority to terminate an at-will employee when there is specific intent of the employer to harm the employee. Frymire v. Paine Webber, Inc., 107 B.R. 506 (E.D. Pa. 1989).

In Pennsylvania, certain classifications of Counties such as Cambria County are not governed by statutory provisions requiring just cause or economic necessity prior to dismissal of a deputy. This is in contrast to the protections afforded municipal police officers and other state and local employees protected by Civil Service laws. The authority of the County, through its Sheriff, to terminate the employment of its deputy Sheriffs is not unfettered. The distinction to be drawn between Sections 1203 and 1205 of the County Code and analogous provisions of the various Municipal Codes in the Commonwealth applicable to police (i.e. the Borough Code, 53 P.S. §45101 et seq., and the First and Second Class

Township Codes 53 P.S. §55101 et seq. and 53 P.S. §65101 et seq. respectively) is that the latter statutory provisions specifically provide for dismissal of police only for just cause or a reduction in the work force for economic reasons. A County need not show just cause to terminate a Deputy, however, it cannot terminate the employee for unlawful and/or discriminatory reasons as previously stated, nor can one of the municipalities above referenced. In that regard, County deputies and municipal police officers must be treated identically notwithstanding the presence or absence of just cause.

In the present case, it is beyond cavil in the Third Circuit that as of 1982 "the law was 'clearly established' that a public employee could not be demoted in retaliation for exercising his rights under the First Amendment". Bennis v. Gable, supra at 733. In Bennis v. Gable, the Third Circuit specifically held that the illegality of

political patronage firings or retaliatory action against employees for exercising First Amendment rights was clearly established as of 1982. In that case, two demoted police officers brought a civil rights action against the Mayor, the Chief of Police, and the City of Allentown alleging that the demotions were in retaliation for their support of the Mayor's opponent in the 1977 and 1981 mayoral election. The Defendants in Bennis had attempted to argue that even though retaliatory patronage dismissals were clearly established at the time of the employment decision, it was not clear whether demotions for political reasons were permissible. The Circuit Court rejected that argument reasoning that strict factual identity with prior Court decisions is not necessary for the Court to find that analogous conduct has been clearly established as forbidden conduct. In Bennis, the Court relied on its 1984 decision in People of Three Mile Island v. Nuclear

Regulatory Commissioners, supra, which requires some but not precise factual correspondence, and which demands that officials apply general, well developed legal principals:

> While we cannot expect executive officials to anticipate the evolution of constitutional law, neither can we be faithful to the purposes of immunity by permitting such officials one liability-free violation of a constitutional or statutory requirement . . .

Bennis v. Gable, supra at 733.

Applying that rationale to the instant case, there is a correlation between the Third Circuit's pronouncement in Bennis v. Gable, supra, and the instant case, notwithstanding the statutory language of the County Code on which the Petitioners rely. As of 1982, a reasonable public official in the Third Circuit knows that a public employee cannot be subjected to retaliation, be it termination or demotion, for exercising First

Amendment rights.

The Petitioners site in their Petition the recent Seventh Circuit decision in Upton v. Thompson, 930 F.2d 1209 (7th Cir. 1991), in support of their argument that the termination of a Deputy Sheriff for political reasons was not clearly established as being unlawful at the time of the firings of the instant employees in 1986. The Seventh Circuit's decision can be factually distinguished from the present case and the Third Circuit Court's position regarding political patronage employment decisions in Bennis v. Gable. In Upton the Seventh Circuit reasoned that the law is unsettled as to whether partisan political affiliation is a proper job requirement for Deputy Sheriffs. The Court pointed to conflicting treatment by the Federal Courts in attempting to apply the principles established by the Supreme Court in Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and Branti v. Finkel,

445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). The Seventh Circuit reached a different conclusion when it applied the Elrod/Branti standard to the facts of that case. It concluded, without much explanation, that the deputies in that case, in the State of Illinois, exercised such "wide latitude and discretion in the performance of their duties and in the implementation of department goals" so as to rise to the level of creating policy, thus making them policy makers which would, according to that court, necessitate a common political affiliation in the department. The Seventh Circuit's view of the function of a deputy is fact specific to Illinois. In addition, the Seventh Circuit assumes in its analysis of the case law that the role and function of a deputy is the same in every jurisdiction. This is not the case. Deputies in the Commonwealth of Pennsylvania perform different functions depending on the County in which the department is located. In some

counties, such as Cambria County, the deputies do little more than serve court papers and provide security within the courtroom. In fact, Judge Sloviter noted in her opinion in the instant appeal to the Third Circuit that the parties had agreed that the deputies in Cambria County performed ministerial duties only, such as service of process, transporting prisoners, and courtroom security. In other counties such as Allegheny County the deputies exercise arrest powers and cooperate with state and local law enforcement officers in the apprehension of fugitives and criminal suspects. Thus, some deputies in Pennsylvania exercise very little discretion in the exercise of their duties while others are expected to make decisions similar to those of other law enforcement officers. In either instance, however, the discretion that is exercised by deputies, like that of the municipal police officers in Bennis v. Gable, supra, does not rise to the level of

"creating" policy. A deputy or municipal police officer is trained in the techniques to be used in the performance of his or her duties, and the political affiliation of the employee does not impact on the ability of the individual to do the job.

The Third Circuit has taken an enlightened approach, applying the rule established in Elrod/Branti as a general, well developed legal principal that a reasonable politician must know as of 1982 that a demotion or termination of an employee in retaliation for his political speech and/or associations is impermissible.

II. THE DISMISSAL OF THE RESPONDENTS BY THE PETITIONERS, AND THEIR RELIANCE ON THE LETTER OF THE COUNTY ATTORNEY, WERE NOT OBJECTIVELY REASONABLE.

The Petitioners also rely in their Petition on the fact that Attorney Alex Echard, county solicitor and labor advisor, issued an opinion relative to the termination

of Deputy Sheriffs. Their reliance is unreasonable and without basis for two reasons: (1) The opinion of Mr. Echard is incomplete in its consideration because it fails to address those situations, whether the employees are "at-will" or otherwise, which constitute an unlawful termination because of a violation of constitutional rights, statutory rights or public policy, Elrod v. Burns and Branti v. Finkel, supra; and (2) The subjective belief or actual knowledge of the government official is no longer a proper consideration under the "objective test" established by the United States Supreme Court, Harlow v. Fitzgerald, supra.

With regard to the first, the opinion letter of Mr. Echard dated November 22, 1985 makes no mention of the Elrod/Branti analysis, nor does it discuss any of the possible constitutional protections which shield public employees from unlawful retaliation for exercising guaranteed rights.

The opinion does not go beyond the mere language of the County Code, failing to take into consideration the extensive treatment given such issues by the federal and state courts. The Petitioners cannot possibly have relied on the Echard opinion for the purpose argued in the Petition.

With regard to the second, the Petitioners have maintained before the district and appellate courts the untenable position that Sheriff Roberts' reliance on the "opinion" of Mr. Echard absolved him and the other defendants from liability for violating the Respondents' constitutionally protected rights. As previoulsy stated, however, the standard which was developed by this Court in Harlow v. Fitzgerald is an objective standard, viewed in light of a reasonable person in the public official's position. The subjective knowledge or political prowess of the individual does not and should not control. If the County and its government officials are

permitted to shield themselves from liability for unlawful activity simply by securing a legal opinion from its Solicitor purportedly authorizing the unlawful act, public employers would have the ability to ignore constitutional and statutory rights with impunity. The legal opinion of Mr. Echard, which does not address the political patronage issue, and which is devoid of any analysis as to the violation of constitutional rights, does not shield the government officials from liability even though that may have been its intent.

III. THE DEPUTY POSITION IS NOT CONFIDENTIAL SO AS TO MAKE PARTY AFFILIATION A REQUIREMENT OF THE POSITION.

The Petitioners argument that the Pennsylvania Legislature's decision to allow a sheriff to appoint or revoke an appointment at will "implies" that the deputy position is confidential is without any basis in the

record before either the District or Appellate Court, and is a blatant misrepresentation of the facts. The Opinion of Chief Circuit Judge Sloviter clearly states:

> All counsel in their briefs and during oral argument agreed that deputy sheriffs in the Cambria County Sheriff's office primarily perform three tasks: they serve process; they transport prisoners to and from court and between facilities; and they provide security in courtrooms.
>
> * * *
>
> We cannot say as a matter of law that party affiliation would further the effective performance of these tasks. In Elrod, one of the plaintiffs was the chief deputy of the process division, presumably more of a policymaking position than one who simply serves process, and he was held entitled to First Amendment protection. (Citation omitted). The defendants have offered no reason why the political alignment between the deputy and the sheriff is relevant to the deputies' duties in serving process, transporting prisoners, or guarding courtrooms.

Petitioner's Appendix A, p. 17a.

There is absolutely no basis for the Petitioners' averment that deputies in Cambria County "necessarily have access to confidential communications and records," when

in fact the opposite is true.

IV. THE DENIAL OF SHERIFF ROBERTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS OF QUALIFIED IMMUNITY WAS INTERLOCUTORY AND NOT IMMEDIATELY APPEALABLE.

In Prisco v. United States, 851 F.2d 93 (3rd. Cir. 1988), the Third Circuit Court dismissed the interlocutory appeals of Defendants Edwin Meese and Stanley Morris who sought review of the District Court's denial of their Motions for Summary Judgment on the basis of qualified immunity. The Plaintiffs in Prisco were seeking declaratory and injunctive relief, as well as monetary damages, in their action against the United States and against William French Smith, Edwin Meese and Stanley Morris, individually and in their official capacities, with regard to the placement of a minor child into the Federal Witness Protection Program. The individual Defendants filed Motions for Summary Judgment claiming qualified immunity and failure by the

Plaintiffs to allege actions on the part of the Defendants which violated the Plaintiffs' rights. The Third Circuit, analyzing the appealability of the qualified immunity issue, held that the immunity defense is not applicable to claims seeking prospective relief, i.e. declaratory and injunctive relief. The Court reasoned that the underlying purpose of providing immunity to public officials is to shield the official from suits for damages which would otherwise have a disruptive effect on the official's exercise of discretion. Public officials would be less inclined to make decisions and take official action if subject to a persistent threat of monetary damage when performing discretionary functions. The purpose of the qualified immunity is <u>not</u> to allow public officials to violate rights with impunity, but rather, to minimize any chilling effect on the public official with regard to fulfilling official duties. As noted by Chief

Judge Gibbons, the policy rationale for qualified immunity "is that we do not want officials to make discretionary decisions with one wary eye on their pocket book". 851 F.2d at _____.

The Court went on to consider whether the underlying rationale for qualified immunity has any applicability to a law suit involving a prayer for injunctive relief. Judge Gibbons held that the party against whom an action for prospective relief is pending cannot appeal from the denial of a Motion for Summary Judgment on immunity grounds. He reasoned that an official acting in violation of the law, although shielded from the threat of money damages by virtue of qualified immunity, cannot continue to act in an illegal manner causing a further and continued deprivation of rights. Even if the Court were to determine that qualified immunity was applicable, the underlying question of whether statutory or constitutional rights have been

violated remains unanswered. A Plaintiff may well be entitled to injunctive relief even though the public official can prove that the conduct which is the subject of the claim did not violate clearly established law, and is thus shielded from liability for money damages. As a result, the litigation must go forward without interruption by an interlocutory review of the qualified immunity issue.

In the present case, the Respondents have requested in their complaint that the court award injunctive relief by reinstating the Respondents to their positions with the County, and in directing the Petitioners to cease and desist any further retaliatory actions against the Respondents. Throughout the course of this action, the Petitioners have taken every opportunity to delay final resolution of the Respondents' claims, using the passage of time to further disadvantage the Respondents thus causing a continued

deprivation of rights. The eleventh hour appeal, just five (5) days prior to the date of trial, has caused undue hardship on the Respondents who are without the economic wherewithall to pursue their claims.

Applying the Third Circuit's rationale in Prisco, the appeal of Jay Roberts was properly dismissed on jurisdictional grounds because claims for prospective relief are still pending against him and the municipal defendants. There is no reason to further delay resolution of the Respondents' claims that they are entitled to be reinstated to those positions from which they were unlawfully removed. The interlocutory review of the qualified immunity issue only stands to further prejudice the Respondents.

CONCLUSION

Based on the arguments and authorities cited herein, the Respondents,

Mutsko, Beaujon, Plummer and Ardini, request that the Petition for Writ of Certiorari be denied and the matter remanded to the District Court for trial.

RESPECTFULLY SUBMITTED,
Martin G. Holleran
Counsel for Respondents